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IN THE

Supreme Court of the United States

October Term, 1957

No. 681

STANLEY S. HECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SANFORD H. COHEN
Counsel for Petitioner
Office & P. O. Address
16 West 46th Street
New York 36, New York

DANIEL H. GREENBERG
Of Counsel

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Stanley S. Hecht, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 23, 1957.

Opinion Below

The court of appeals wrote no opinion in this proceeding; it merely noted: *Per Curiam*: "Affirmed. *United States* v. *Johnson*, 247 F. 2d 5."

Jurisdiction

The judgment of the Court of Appeals was entered on October 23, 1957. Mr. Justice Harlan granted petitioner an extension until December 23, 1957, to file the petition for writ of certiorari in this proceeding. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254 (1).

Questions Presented

The questions presented in this case relate to the sufficiency of the evidence of non-compliance by petitioner with the grand jury subpoena *duces tecum* served upon him as an officer and director of a corporation, and with respect to his failure to comply with the district court's direction to obey said subpoena; to the sufficiency of the evidence of the existence of the alleged non-produced records at the time of the service of said subpoena; to the sufficiency of the evidence of criminal intent by petitioner in failing to comply with said subpoena and district court direction; and to the good faith compliance by petitioner with the order of the district court to produce said records, and that all said records have been produced or furnished to the government.

Statute Involved

The statute involved in this case is Title 18, United States Code, §401(c), which reads as follows:

> A court of the United States shall have power to punish by fine and imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Stanley S. Hecht, was convicted of criminal contempt of court in the District Court for the Southern District of New York, for failing to produce before a grand jury, in response to a subpoena *duces tecum* served upon him, certain corporate books and records of World Over Export Trade Corporation, of which petitioner was president. On June 5, 1957, petitioner was adjudged in criminal contempt and sentenced to three months' imprisonment; he was released in $5,000 bail pending appeal, which bail remains effective pending review by this Court. The district court held that petitioner had failed to comply with the grand jury subpoena *duces tecum* and the order of the court to produce the required records. The court of appeals affirmed this finding on October 23, 1957, but stayed its mandate pending review in this Court.

The Record

The record of this case before the court of appeals was the certified original record of all of the proceedings in the district court, with the exception of four government exhibits received in evidence, but which remained in the possession of the United States Attorney for the Southern District of New York, and printed appendices by both petitioner and respondent in the court of appeals. The aforesaid exhibits have been ordered certified by the court of appeals below upon application of petitioner for transmittal with the original record of the district court, and this petition is based upon the complete record of the proceedings in the district court as hereinbefore mentioned.[1]

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[1] Wherever numbers in parentheses are indicated, they refer to pages in the certified original record.

The Facts

On April 5, 1954, an indictment was returned in the district court below in which petitioner and World Over Export Trade Corporation, among others, were named as defendants. This indictment charged a conspiracy to violate certain customs, laws and regulations by the use of certain false and fraudulent statements, invoices, declarations and affidavits, among other things, in violation of Title 18, U. S. Code §371.[2]

During the pendency of this case and before it was moved for trial, the United States Attorney on March 27, 1957 caused a subpoena *duces tecum* to be served upon petitioner as President of World Over Export Trade Corporation, for the production of books and records of the corporation before the grand jury sitting in the district court below. This subpoena was very broad and comprehensive and required petitioner to produce:

> "All books and records for the calendar year 1956 and the year 1957 to date of World Over Export Trade Corporation, including all correspondence, quotations, invoices, freight bills, export and import licenses, bills of lading, receipts, bank statements, checks, letters of credit, corporate tax return for the year 1956 and any and all other data relating to the operation of subject corporation" (Exhibit One, 336).

Following the service of said subpoena, petitioner arranged with the Federal Bureau of Investigation to permit the agent in charge of this case, James T. Mulroy, to

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[2] Although this indictment is not part of the record in the district court below, nevertheless, it is referred to during the contempt proceedings, and this court is requested to take judicial notice of said indictment and its pendency in the district court (100, 102, 103, 104).

come to his office and go through his files for the purpose of obtaining whatever documents and records were required by the government for its investigation herein. On April 3, 1957 Mr. Mulroy visited the office of World Over Export Trade Corporation and for three days he went through the files of this firm, removing more than 700 documents therefrom. During the course of his investigation, Mr. Mulroy asked petitioner about certain particular records which were missing. Petitioner explained that all of his records were in the office, but that the charwoman might have thrown some of them away. It appears that this office consisted of two small rooms and contained several desks and file cabinets; that there were more records than file space and some of the records were kept in carton boxes and on the floor of the office. Mr. Mulroy was given untrammeled and completely free access to all of the corporation's records. He took with him whatever he wanted.

Following Mr. Mulroy's departure from World Over's offices, on May 15, 1957 petitioner was brought before the grand jury and asked a great many questions with respect to the details of his transactions with export firms which were the subject of the pending investigation. To most of the questions put to him he invoked the privilege against self-incrimination and he was thereupon taken before the district court for the purpose of compelling his answers to said questions. District Judge Lawrence E. Walsh directed petitioner to produce whatever non-produced records he had failed to produce, but he also advised the Assistant United States Attorney that except as to questions touching on the whereabouts of the non-produced records, petitioner could not be required to answer questions which would "compel him to disclose the occurrence of events in connection with a particular transaction" (18).

Petitioner thereupon returned to the grand jury where he again testified that all records in the possession of the corporation called for in the subpoena were produced or permitted to be taken from the corporation's files by the FBI. Petitioner was before the grand jury again on May 17, 1957 and May 28, 1957. On June 4, 1957 contempt proceedings were commenced before District Judge Edmund L. Palmieri.

The government called two principal witnesses to testify in the contempt proceeding. These witnesses were Sigmund L. Cohn, a former employee of petitioner's firm, and Special Agent James T. Mulroy of the Federal Bureau of Investigation. Mr. Cohn testified, in substance, that records were kept of all transactions engaged in by World Over and that he had last been employed by this firm in February, 1957. To his knowledge, copies of invoices, correspondence and other records were kept by the corporation. He did not have exclusive access to the files and he knew that there were other persons employed on a part-time basis and that the firm employed various accountants who also had access to these files. Following his departure, he had no knowledge of the whereabouts or existence of the corporation's records. This witness did not give any testimony concerning the existence of particular records; his answers were couched in broad general terms.

Agent Mulroy, an accountant, testified that certain particular records in which he was interested were not found by him in the files of the corporation, although he was given free access to these files for a three day period. He took more than 700 documents from the files of the corporation during the course of his examination, which he took away with him. He testified that there were files and records all over the floor but that "important papers were found in the file cabinets" (76). During the course of his

examination he had occasion to ask petitioner about certain records and while petitioner was very cooperative, he, nevertheless, explained that the charwoman might have thrown away records which were lying on the floor. There is no testimony that Agent Mulroy made any investigation of this claim at any time thereafter. He also ascertained that petitioner did not take records out of the files and out of the office with him.

The district court held petitioner in contempt on the basis of this showing, notwithstanding the complete cooperation of petitioner in enabling Agent Mulroy to examine freely all of the records of the corporation at its offices and to take with him more than 700 records he desired. Following the adjudication of contempt and the sentence of three months' imprisonment, on June 5, 1957 petitioner was permitted to introduce evidence in support of his good faith compliance with the requirements of the subpoena *duces tecum*. Petitioner testified that the size of his office, the volume of records maintained and the fact that the charwoman sometimes threw records away while cleaning, all were factors to be considered in support of his good faith compliance with the subpoena. Sometimes he, himself, was unable to locate documents required in connection with the operation of this business (120). In addition, all of the transactions conducted by World Over were entered in the books of account of the corporation and these books of account were fully exposed and made available to Agent Mulroy and every transaction was reflected in these books. In addition, various of the corporate records, such as bank statements and checks, might have been in the possession of the various accountants engaged by this firm to audit its books and to prepare its necessary tax returns.

At the conclusion of petitioner's testimony, the district court stated that it adhered to its decision but it, never-

theless directed the Assistant United States Attorney to have the FBI agent conduct a further investigation in the matter. This investigation was to include an interview with the superintendent of the building and the charwoman who cleaned World Over's offices. Also, that the accountant who audited its books was also to be interviewed. The Assistant United States Attorney advised the court that he would have the FBI "immediately contact them and see what substance there is to the statements which Mr. Hecht has made" (145). Notwithstanding this direction by the court and this statement by the prosecutor, nothing further was done in this regard by the government and the contempt conviction remained standing, while petitioner's case proceeded through the appellate process.

Reasons for Granting the Writ

The decision of the Court of Appeals below rests solely upon its citation of *United States* v. *Johnson*, 247 F. 2d 5. The district judge's finding that petitioner failed to produce all the corporate records called for in the subpoena *duces tecum*, that these non-produced records are in existence, that petitioner's failure to produce these records was willful and with criminal intent and that there was no showing of good faith compliance by the petitioner with the order of the court, is not supported by the evidence adduced in the contempt hearings held in the district court below.

1. This court has often stated that it "has never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support a determination)." (*Mortensen* v. *United States*, 322 U. S. 369, 374.) The evidence of record in this case fairly discloses that petitioner cooperated completely with the government in allowing them free access to the corporate books and records of his corporation, including the

right to remove more than 700 documents from its files. This was done at a time when petitioner was already under indictment and awaiting trial for a prior offense. This first indictment had been returned during 1954, but had not been called for trial as late as March 27, 1957 when this subpoena *duces tecum* was served. It is significant to observe also that World Over was a co-defendant in the pending indictment.

In *Curcio* v. *United States*, 354 U. S. 118, this Court directed entry of a judgment of acquittal for a defendant who failed to produce any of the subpoenaed records of which he was custodian. In this case, more than 700 records were permitted to be removed by Agent Mulroy without any itemized receipt being given therefor. Agent Mulroy's testimony clearly indicates that petitioner was fully cooperative and allowed him free access to all of the corporation's files and records. Agent Mulroy observed the physical lay-out of World Over's offices and he saw that there were many more records kept than available file space to keep them. The questions asked petitioner before the grand jury, as to which he claimed his personal privilege against self-incrimination, did not touch upon the whereabouts of these records but mainly dealt with the contents of records and petitioner's personal participation in the affairs of this corporation. Petitioner and the corporation had already been indicted in 1954 in the district court below on charges arising out of their conduct of this export business and following this contempt adjudication they were additionally indicted in two new separate indictments.[3] Petitioner at no time asserted any personal privilege with respect to the production of corporate records and for this reason, at least, cases such as *Wilson* v.

[3] These new indictments, name as defendants petitioner and the corporation, bear docket numbers C153-240 and C154-100 in the district court below.

United States, 221 U. S. 361 and *United States* v. *White*, 322 U. S. 694 are not applicable to this proceeding.

The district judge before whom petitioner was first taken limited his direction to petitioner to a production of records; petitioner was not required to answer questions dealing with the contents of said records or his personal participation in the affairs of the co-defendant corporation. Although the same procedure was followed here as in the *Johnson* case, *supra*, nevertheless, the evidence of record in this proceeding is far less persuasive and does not support the finding made by the district court. Petitioner's conduct in allowing Agent Mulroy free access to the corporation's records is strong evidence in support of this argument that he has not refused to comply with the subpoena. Petitioner's failure to comply with the subsequent district court direction to produce the non-produced records, which by then had concededly been demonstrated not to be in existence, cannot be considered willful and contumacious. Cases such as *Nilva* v. *United States*, 352 U. S. 385, and *Lopiparo* v. *United States*, 216 F. 2d 87, do not control the facts of this case. Rather they seem to fall within the rule of *United States* v. *Patterson*, 219 F. 2d 659.

2. Examination of the subpoena *duces tecum* discloses that it is very broad and all-encompassing. The failure to comply with the subpoena and the district court's direction must necessarily be considered in terms of proof of the existence of the non-produced records. This proof does not meet the standards set by this Court as to the sufficiency of evidence in this type of case.

No attack was made in the district court against the sufficiency of the subpoena *duces tecum* for failure to particularize the records and documents to be produced. Notwithstanding this fact, this Court may examine this sub-

poena in terms of specificity, to determine the extent of petitioner's compliance with it, for the purpose of observing that the extent of non-compliance is vague and indefinite. Almost any non-production of any particular record could be seized upon by the government as evidence of contempt. That this was precisely the objective of the contempt proceeding is apparent from the record in the district court below. The questions asked petitioner in terms of this setting, and in the light of the then (and still) pending and subsequent indictments against him and this corporation, disclose that the principal objective of the government was to compel him to undergo punishment in advance of trial. The extent of petitioner's cooperation in producing and providing access to the corporation's records is lost in this setting. The evidence of the continued existence of the non-produced records thus is very insubstantial. The witness Cohn testified very generally with respect to the existence of records and his testimony provides no basis for assuming that particular records continue to exist. Agent Mulroy's testimony that he could not locate particular records in which he was interested provides no basis for assuming the existence of these particular records. Standing alone, the mere failure to produce records of a general nature is not proof of the existence of particular records, in the absence of direct proof that particular non-produced records actually exist. The facts of this case require a finding that the government has not met its burden of proof of petitioner's guilt beyond a reasonable doubt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Mason* v. *United States*, 244 U. S. 362, 365; *Hoffman* v. *United States*, 341 U. S. 479, 486-487; *United States* v. *Fleischman*, 339 U. S. 363. Since the evidence against petitioner with respect to the existence of the non-produced records is circumstantial evidence, such circumstantial evidence must necessarily exclude every reasonable hypothesis

of petitioner's innocence. *Maryland & Virginia Milk Producers Association, Inc.* v. *United States*, 193 F. 2d 907, 917.

3. The government has made no showing of the requisite criminal intent on the part of petitioner in willfully failing to produce the records required by the subpoena and the district court's direction to him. Defendants in criminal contempt cases are afforded the same presumption of innocence as are any other criminal defendants on trial. *Quinn* v. *United States*, 349 U. S. 155, 162; *United States* v. *Fleischman, supra; Michaelson* v. *United States*, 266 U. S. 42, 66; *United States* v. *Goldman*, 277 U. S. 229. They also have the same privilege against self-incrimination as other criminal defendants (*Quinn* v. *United States, supra*). In criminal contempt proceedings, criminal intent is an essential element of the crime charged and, as with any other essential element of a criminal case, it must be established beyond a reasonable doubt (*United States* v. *Kroger Grocery and Baking Co.*, 163 F. 2d 168; *Wilson* v. *North Carolina*, 169 U. S. 586, 600; see *Nilva* v. *United States, supra*, page 395, fn. 9 and the dissenting opinion at page 399).

Petitioner's conduct herein negatives any claimed proof of criminal intent. The government's case rests upon the barest showing that certain records were not produced. But in the light of the over-all facts in this case, it is clear that the government has not established beyond a reasonable doubt that petitioner was possessed of the requisite criminal intent to commit a crime of criminal contempt. The finding of contempt by the district court is necessarily based upon circumstantial evidence and it is clear that this circumstantial evidence does not exclude every reasonable hypothesis of innocence. This court need not accept or adopt the "rational derivative inferences" (see *United States* v. *Masiello*, 235 F. 2d 279, 285, dissenting

opinion by Frank, *C.J.*, at page 290, fn. 9) of the district court, and it may determine that petitioner did not commit the crime of criminal contempt with criminal intent.

4. The record is clear that petitioner sufficiently showed his good faith compliance with the subpoena *duces tecum* in permitting the government to have free access to his corporation's records and files. Whatever burden petitioner may have of showing his good faith compliance with the requirements of the subpoena were more than sufficiently demonstrated by his conduct throughout this proceeding. As a matter of fact, the district court's direction to the government and the government's agreement to conduct further investigation of this matter through the interrogation of the building superintendent, charwoman and World Over's accountant, is evidence that the district judge was not fully satisfied that petitioner's conduct was in fact contemptuous (although the district judge held that it was).

This proceeding was commenced by the government in an effort to compel petitioner to answer self-criminating questions, in violation of the rule of *Curcio* v. *United States, supra.* In shifting the emphasis of this proceeding away from such self-criminating questions, Judge Walsh limited the government to showing non-compliance with the subpoena, and the subsequent district court direction to produce the non-produced records. Petitioner's efforts towards compliance are substantial evidence of his good faith compliance with the demands of the subpoena. See *United States* v. *Fleischman, supra,* page 363. Since there was substantial compliance with the subpoena, by the production of all the records and the permission to the FBI to carry away more than 700 of these records, it is clear that petitioner's conduct was not willful and contumacious. See *United States* v. *Gordon,* 236 F. 2d 916, 920.

For the foregoing reasons, it is respectfully submitted that this case warrants review by certiorari.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

December 19, 1957.

Respectfully submitted,

SANFORD H. COHEN
Counsel for Petitioner
Office & P. O. Address
16 West 46th Street
New York 36, New York

DANIEL H. GREENBERG
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of October one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. J. EDWARD LUMBARD,
HON. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

STANLEY S. HECHT,
Defendant-Appellant.

JUDGMENT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk